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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 980

JAMES F. McMANUS,

*Petitioner,*

—v.—

LAKE CENTRAL AIRLINES, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A) is reported in 327 F. 2d 212.

### Statement of the Case

***Summary Statement***

Petitioner, a practicing attorney and former travel agency owner, brought this action in 1958 against eighteen airlines including respondent, Lake Central Airlines, Inc., alleging a conspiracy to exclude him from the sale of domestic air

transportation in violation of the antitrust laws and seeking treble damages of $16,875,000 (R. 68-74). The airline defendants were all members of the Air Traffic Conference (ATC), a division of the Air Transport Association of America, a trade association of all certificated domestic air carriers.

The action was tried before the court and a jury in June 1963 in the United States District Court for the Eastern District of New York. Prior to trial, petitioner made a motion for summary judgment which was denied. At the time of trial, respondent was the sole remaining defendant, all the others having been dismissed at earlier stages of the proceedings. At the conclusion of the entire case, the trial court granted respondent's motion under Rule 50 of the Federal Rules of Civil Procedure and directed the jury to return a verdict in favor of the defendant, after finding "as a matter of law that the defendant complied with the law and did not conspire to violate it" (R. 6a).

Only respondent had moved for judgment at the conclusion of the trial. Petitioner, as plaintiff, made no motion for a directed verdict or for judgment n.o.v. under Rule 50, and no motion for a new trial under Rule 59.

The basic question of law on which the case was decided was one which petitioner had previously propounded in an administrative review proceeding entitled *McManus v. Civil Aeronautics Board*, 286 F. 2d 414 (2d Cir.), *cert. denied*, 366 U. S. 928 (1961), cited by the District Court as authority for its ruling. This question, which was decided adversely to petitioner, concerns the legality of the so-called "conference system" and of the immunity from the antitrust laws afforded the airline members of ATC in connection with the selection, appointment and retention of travel agents.

In upholding the directed verdict, the Court of Appeals noted that petitioner's allegations of conspiracy on the part of respondent "were wholly predicated on Lake Central's membership in the Air Transport Association of America, and the resolution of that organization restricting the dealings of member airlines to travel agencies approved by the association" (Pet. App. A, p. 26). The case thus presented no issue for a jury, as is quite apparent from petitioner's statement of questions presented (Pet., p. 2).

***The "Conference System" and the Statutes and Orders Relating Thereto***

The conference system for the selection and retention of travel agents was established by a formal agreement among the members of ATC known as the ATC Agency Resolution. This Resolution became effective when it was filed with and approved by the Civil Aeronautics Board (C. A. B.) under Section 412 of the Civil Aeronautics Act, 49 U. S. C. 492 (now Section 412 of the Federal Aviation Act, 49 U. S. C. 1382), upon a finding that it was not adverse to the public interest. The Resolution involved here was first adopted and approved by the C. A. B. in 1945 and, with minor amendments, remained in effect throughout the time period embraced in the complaint.

The following quotation from the opinion in *ATC Agency Resolution Investigation*, 29 C. A. B. 258 (1959), a proceeding in which petitioner participated, accurately summarizes the terms of this Resolution insofar as here involved (at 259-60):

> "Selection and retention of travel agents by airline members of ATC are governed by the conference system established under the resolution. Each member has agreed not to appoint or retain any agent whose name does not appear on the current ATC agency list or who has not executed the standard agency agreement.

> No member, however, is bound to appoint or retain particular agents accredited by ATC except by choice.
>
> "* * * Before the application of a prospective agent may be considered by the agency committee, the applicant must gain the formal 'sponsorship' of a member carrier. Once considered, the applicant must demonstrate to the satisfaction of two-thirds of the members voting that he meets the standards of 'satisfactory credit standing', 'ethical practice', 'willingness and ability to sell' and 'need.' If approved, the applicant is listed and allowed to execute an agency agreement.
>
> "A disapproved applicant, however, receives no notice of the grounds for his rejection."

Pursuant to the express terms of Section 414 of the Civil Aeronautics Act, 49 U. S. C. 494 (now Section 414 of the Federal Aviation Act, 49 U. S. C. 1384), C. A. B. approval of the Resolution under Section 412 operated to confer statutory immunity upon the airlines from liability under the antitrust laws for all actions taken in accordance therewith. Section 414 reads in pertinent part as follows:

> "Any person affected by any order made under sections 488, 489, or 492 of this chapter shall be, and is hereby, relieved from the operations of the 'antitrust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

***Respondent's ATC Membership the Only Basis of Suit***

Respondent was not one of the carriers with whom petitioner "experienced difficulties with respect to business dealings" (Pet., p. 5). Petitioner never applied to respondent for sponsorship (R. 297), since respondent services

no airport in New York State except Buffalo (R. 11a, par. 16). Respondent's representative had to leave the ATC meeting in September 1957 before petitioner's application was voted on, and respondent did not vote on or otherwise participate in the consideration of the application (R. 364-65). In short, respondent's only connection with the alleged antitrust conspiracy was its membership in ATC in and after March 1954, when petitioner established his travel agencies in Nassau County, Long Island and applied for ATC approval (R. 9a; Pet., p. 5).

***Prior C. A. B. and Court Proceedings***

Although petitioner devotes much of his statement of the case to prior proceedings before the C. A. B. regarding the ATC Resolution (Pet., pp. 6-9, 14-15), he significantly omits mentioning the complaint he filed with the C. A. B. asking that Board to condemn the former ATC procedures for agency selection—the basis of his complaint in this action—as not having been within the Board's prior approval of the Resolution and, therefore, in violation of the Federal Aviation Act. The C. A. B. dismissed petitioner's complaint as "without merit" (Order No. E-15143, April 22, 1960, 30 C. A. B. 1019), pointing out (at 1020):

> "While the Board, in Order E-14912, found that it would disapprove the resolutions unless modified, it did not revoke prior orders of approval and ordered the record kept open for the purpose of permitting the filing of amendments to the resolutions. In view of the subsequent amendments and the ultimate Board orders granting approval to the revised resolutions, it cannot be held that the resolutions were stripped of their lawful status, or that imposition of penalties is warranted."

Petitioner thereafter sought and obtained in the court below review of that order as well as other Board orders. On that review he contended, *inter alia*, that the Resolution was not within the scope of Section 412, that Sections 412 and 414 were unconstitutional and that the C. A. B. erred in holding that ATC agency selection practices were within the approved Resolution and, therefore, not a basis for instituting enforcement proceedings against ATC members.

The court below, upholding the constitutionality of the Federal Aviation Act and its applicability to the Resolution, affirmed the C. A. B. orders. *McManus* v. *Civil Aeronautics Board*, 286 F. 2d 414 (2d Cir. 1961). The court stated (at 418):

> "As a result of the Board's approval, carriers acting under the resolution were, by reason of §414 of the Federal Aviation Act, 49 U. S. C. A. §1384, exempted from the operation of the antitrust laws. The Board was aware of the restrictive effect which this practice would have on competition in the ticket-agent market and its possible abuse, but it approved of the resolution nonetheless."

This Court denied petitioner's application for certiorari, *ibid.*, 366 U. S. 928 (1961).

In affirming the judgment against petitioner in this case, the court below noted its prior decision, pointing out (Pet. App. A, p. 26):

> "And in that opinion, which set forth all of the material facts relevant to the present case, we expressly recognized the immunity from antitrust prosecution which CAB approval had afforded.
>
> "The appellant is here seeking precisely that relief to which our earlier opinion told him he was not entitled."

## REASONS FOR DENYING THE WRIT

### I. No question is properly presented for review.

The petition purports to set forth five questions for review, numbered "(a)" through "(e)" (p. 2). Questions "(a)", "(b)", "(c)" and "(e)", however, were not briefed, argued or otherwise raised in the court below (R. Brief and Appendix of Plaintiff-Appellant). Nor are they anywhere argued in the present petition.

It is well settled that "Only in exceptional cases will this Court review a question not raised in the court below." *Lavin* v. *United States*, 355 U. S. 309, 362, fn. 16 (1958); *Daignan* v. *United States*, 274 U. S. 195, 200 (1926). Petitioner has shown no exceptional circumstances here, and none exist.

Petitioner's question "(d)", "whether the District Court could have and should have granted petitioner's motion for a summary judgment in view of Civil Aeronautics Board Decision and Order E-14012 adopted June 10, 1959 (29 CAB 158)," was raised in the court below. In fact, it was the only specific ground urged by petitioner for reversal of the District Court's decision and is the only "Question" which is again mentioned in the petitioner's "Argument." It is, however, merely a conclusion, not the statement *of* a question for review "expressed in the terms and circumstances of the case" as required by this Court's Rule 23.1.(c).

More importantly, the trial court's denial of petitioner's motion for summary judgment was clearly correct for the reasons stated in the court's opinion, *McManus* v. *Capital Airlines, Inc.*, 25 F. R. D. 34 (E. D. N. Y. 1960). Further, petitioner, having proceeded to a full trial of all

issues raised by the pleadings, having failed to move for a directed verdict at the trial, having had a verdict directed against him and having failed to move for judgment notwithstanding the verdict, may not now obtain review of the denial of his summary judgment motion. *Cf. Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 217-18 (1947); *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, 573 (1948); *Dighler Metal Furniture Co.* v. *United States*, 149 F. 2d 130, 135 (2d Cir. 1945); *Bisciano* v. *Reinecke*, 313 F. 2d 542 (2d Cir. 1963); *Mirabile* v. *New York Central R. R. Co.*, 230 F. 2d 498, 499 (2d Cir. 1956).

No question, therefore, has been properly presented for review by this Court.

**II. The petition seeks to raise only questions which have already been decided against petitioner in prior proceedings.**

Petitioner does not dispute the holding of the court below that the conspiracy allegations against respondent "were wholly predicated on Lake Central's membership in the Air Transport Association of America, and the resolution of that organization restricting the dealings of member airlines to travel agencies approved by the association." The ATC Agency Resolution referred to was, as stated above, filed with and approved by the C. A. B. pursuant to the Civil Aeronautics Act (now the Federal Aviation Act), thereby immunizing ATC member airlines from antitrust liability for actions pursuant thereto. Petitioner's attempt, nonetheless, to attach antitrust liability against respondent for its membership in ATC, seeks to challenge the validity of the Federal Aviation Act (Pet., p. 2, question "(b)") and of C. A. B. approval of the Resolution (Pet., p. 2, question "(a)"). Petitioner also apparently contends that, in any event, ATC agency selection prac-

tice was not within the C. A. B. approval of the Resolution. Petitioner's principal, if not sole, objection to the former ATC agency selection practice is that it did not provide for notice by ATC to unsuccessful applicants of the reasons for denial of ATC approval (Pet., pp. 18, 19). This, petitioner contends, somehow constitutes "unapproved arrangements or agreements" and strips the ATC of whatever protection might be afforded by C. A. B. approval of the Resolution pursuant to the Federal Aviation Act.

Petitioner's contentions, as already noted (*supra*, pp. 5-6), have previously been fully litigated by him in proceedings before the C. A. B. and the court below and found to be without merit: *ATC Agency Resolution Investigation*, 29 C. A. B. 258 (1959), 30 C. A. B. 570 (1960), in which the Resolution was, with certain required modifications, again approved; *Complaint of James F. McManus Concerning The ATC Agency List*, 30 C. A. B. 1019 (1960), in which the contentions constituting the gravamen of the present action and petition were held by the C. A. B. to be "without merit," affirmed on review by the court below in *McManus* v. *Civil Aeronautics Board*, 296 F. 2d 414, *cert. denied*, 366 U. S. 928 (1961), which correctly disposed of all questions the present petition attempts to reraise.

The court below was clearly correct in affirming the judgment for respondent on the ground that the present action raises only questions which have previously been decided against petitioner.

**III. The petition raises no question of general importance.**

As stated above, petitioner's principal or sole ground for attack on the C. A. B. approved ATC Agency Resolution in effect during the period covered by the complaint is apparently that it did not require the ATC to record and state its reasons for denying approval to unsuccessful agency applicants for ATC listing. Such a requirement, however, is explicitly included in the ATC Agency Resolution currently in effect and approved by the C. A. B. C. A. B. Order No. E-14647, November 12, 1959, 30 C. A. B. 575, 581.* Petitioner's basic objection to former ATC agency approval procedures has, therefore, long been met and will not be a basis for complaint by any other applicant for ATC approval.

Petitioner's only attempt to show a basis for review by this Court is his assertion that the decision below conflicts with unspecified "applicable principles" from four cited cases (Pet., p. 17). Petitioner, however, makes no attempt to demonstrate such conflict and a reading of the cited decisions makes plain that none exists.

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* It is noteworthy that petitioner never availed himself of the more liberal approval procedures of the ATC Agency Resolution in effect since 1959 by renewing his application (R. 298).

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Respectfully submitted.

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